

Committee Opinion  
January 14, 1991

Reconsidered and Reaffirmed  
March 21, 1991

LEGAL ETHICS OPINION 1393

CONFLICT OF INTERESTS - MULTIPLE  
CLIENTS - COUNTY ATTORNEY  
REPRESENTING BUILDER BEFORE  
STATE BOARD; PREVIOUSLY  
REPRESENTED LOCAL BUILDING  
OFFICIAL BEFORE LOCAL AND STATE  
BOARD OF APPEALS.

You have advised that Clients contracted to have a home built by Builder and, after moving into the home, discovered construction problems and violations of the State Building Code. Builder brought suit against Clients for the remainder of the sum due under the building contract and Clients counterclaimed for the cost of correction of the deficiencies and other contract violations. At that time, Lawyer X represented Builder.

During the pendency of the suit, Local Building Official reinspected, discovered numerous building violations, and ordered Builder to correct the violations. Clients, claiming that defects had not been corrected, requested hearing before the local Board of Building Code Appeals which confirmed the existence of violations and ordered their correction by Builder. Both the Board and the Official were represented by the County Attorney, Firm B, at the hearing. At the return date, Builder presented evidence to the Board that he had corrected the deficiencies; Clients disputed his claim; and, although ordering other corrections, the Board determined that the home was in compliance with the Building Code. Clients appealed the local Board's decision to the state Board of Technical Review which overruled the local Board, determined that the home continued to have Building Code violations, and ordered Clients to submit plans for correction of the deficiencies. County Attorney, Firm B, represented Local Building Official, appellee before the State Review Board. The issue of the correction of the deficiencies, as found by the State Board, remains pending before the Local Building Official.

At the time of the scheduled trial on Builder's and Clients' cross-claims, Firm B entered an order allowing them to be substituted for Lawyer X as counsel for Builder.

Finally, you have informed the Committee that a member of Firm B is also a trustee on a deed of trust on the house which is the subject of the controversy.

You have requested that the Committee opine as to the propriety of Firm B's current representation of Builder, while the Firm, as part-time County Attorney, continues to represent local Building Official and local Board of Building Code Appeals, and also while a member of the firm serves as trustee on a deed of trust on the subject house.

The appropriate and controlling disciplinary rules to the issue you raise are: DR:5-105(A) and (C), which requires that a lawyer decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely

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to be adversely affected by the proffered employment, except if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure; DR:5-105(E), which holds that, if a lawyer is required to decline employment under DR:5-105, no partner or associate of his or his firm may accept such employment; and DR:9-101(B), which prohibits a lawyer from accepting private employment in a matter in which he had substantial responsibility while he was a public employee. Of particular note is the lack of any curative provision, i.e., client consent, in the latter disciplinary rule.

Under the circumstances you posit, the Committee is of the opinion that a conflict exists under DR:5-105(A) since Firm B represents and advises the local Board and Official who hold the power to find Builder out of compliance with the Building Code. Accepting representation of Builder would place Firm B in the untenable position of representing him as plaintiff in an action the essence of which would be to challenge the findings of the Board and Official, regardless of whether the Board and Official are actual parties to the action. Considering the respective positions of Client, Board and Official, and Builder, the Committee is of the view that it is not obvious that Firm B can adequately represent the interest both of Builder and of Board and Official in the litigation and administrative proceedings in question. Without the ability to meet the threshold test of obviously adequate representation, client consent will not cure the impropriety. (See LE Op. 1128, LE Op. 1239, LE Op. 1304)

Furthermore, the Committee believes that Firm B's acceptance, in its private practice capacity, of representation of Builder in the civil action would be per se improper under the constraints of DR:9-101(B), since the firm has had substantial responsibility for the specific matter in question in its capacity as County Attorney. The Committee cautions that the County Attorney must apply a heightened sensitivity to public perception regarding part-time practice of a public official. (See LE Op. 605, LE Op. 1271; see also ABA Formal Op. 342 at 114-119.)

Finally, it is the Committee's opinion that the fact that a member of Firm B serves as trustee on the deed of trust on the subject house does not raise an impermissible conflict ripe for consideration since the facts do not indicate that any foreclosure is imminent.